87

No. 07-862

FILED
MAR 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

# In the Supreme Court of the United States

JEFFREY KITTKA,

*Petitioner,*

v

STATE OF MICHIGAN,

*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

David G. Gorcyca
Prosecuting Attorney
Oakland County, Michigan

JOHN PALLAS (P42514)
*Counsel of Record*
Oakland County
Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656

MARILYN DAY (P44116)
Attorneys for Respondent

## COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether Petitioner has failed to show compelling reasons for review where the question presented by Petitioner was never raised in the trial court and not discussed by Michigan's highest state court and there exists no contradictory authority that Michigan's indeterminate sentencing scheme violates the Sixth Amendment of the United States Constitution?

## TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

COUNTERSTATEMENT OF THE CASE ..... 1

ARGUMENT

I. PETITIONER HAS NOT SHOWN COMPELLING REASONS FOR REVIEW BECAUSE THE QUESTION PRESENTED BY PETITIONER WAS NEVER RAISED IN THE TRIAL COURT AND WAS NOT DISCUSSED BY MICHIGAN'S HIGHEST COURT AND THERE EXISTS NO CONTRADICTORY AUTHORITY THAT MICHIGAN'S INDETERMINATE SENTENCING SCHEME VIOLATES THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION ..... 5

A. CERTIORARI REVIEW IS UNWARRANTED BECAUSE THE MICHIGAN COURT OF APPEALS HAD ADEQUATE AND INDEPENDENT STATE LAW GROUNDS TO DENY PETITIONER'S APPEAL AND ANY DISCUSSION OF BLAKELY V. WASHINGTON, 542 U.S. 296 (2004) WAS

OBITER DICTUM ..... 5

B. PETITIONER HAS NO CONSTITUTIONAL RIGHT TO AN INTERMEDIATE SANCTION AND TRIAL JUDGES MAY ENGAGE IN JUDICIAL FACTFINDING IN IMPOSING A MINIMUM SENTENCE ..... 8

C. THE TRIAL COURT DID NOT IMPOSE A SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT ..... 12

CONCLUSION AND RELIEF ..... 20

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Apprendi v. New Jersey,* 530 U.S. 466 (2000).....8, 13

*Blakely v. Washington,* 542 U.S. 296 (2004) . *passim*

*Cunningham v. California*, 549 U.S. (2007)..... 16-18

*Harris v. United States,* 536 U.S. 545 (2002) ... 14-16

*McMillan v. Pennsylvania*, 477 U.S. 79 (1986) 14-16

*People v. Carter,* 462 Mich. 206; 612 N.W. 144 (2000) ..... 6

*People v. Drohan,* 475 Mich. 140; 715 N.W.2d 228 (2006) ..... 13

*People v. Harper,* 479 Mich. 599; 739 N.W.2d 523 (2007) ..... 9

*People v. Hornsby,* 251 Mich. App. 462; 650 N.W.2d 700 (2002) ..... 12

*People v. Houston,* 261 Mich. App. 463; 683 N.W.2d 192 (2004), aff'd 473 Mich. 399 (2005) ..... 12

*People v. McCuller,* 479 Mich. 672; 739 N.W.2d 563 (2007) ..... 9, 11, 12

*People v. Perez,* 255 Mich. App. 703; 662 N.W.2d 446 (2003), vacated in part on other grounds 469 Mich. 415 (2003) ..... 12

*People v. Ratkov,* 201 Mich. App. 123; 505 N.W.2d 886 (1993), remanded on other grounds 447 Mich. 984 (1994) ..... 12

*People v. Walker,* 428 Mich. 261; 407 N.W.2d 367 (1987) ..... 12

*Rita v. U.S.*, 127 S.Ct. 2456 (2007) ..... 13

*United States v. Booker,* 543 U.S. 220 (2005) .. 17, 18

**Statutes**

Mich. Comp. Law Ann. §750.520c(West 2007) ..... 1, 8

Mich. Comp. Law Ann. § 769.8(West 2007) ..... 8

Mich. Comp. Law Ann. § 769.31(West 2007) ..... 10

Mich. Comp. Law Ann. §769.34(West 2007) ..... 9, 10

**Other Authorities**

Black's Law Dictionary (7th ed.) ..... 7

**Rules**

Mich. Ct. R. 7.211 ..... 6

Sup. Ct. R. 10 ..... 5

## COUNTERSTATEMENT OF THE CASE

Following a jury trial, Petitioner was convicted of one count of second degree criminal sexual conduct and was acquitted on a second count. Mich. Comp. Law Ann. §750.520c(1)(a)(West 2007); (Tr II, 412).[1] He was sentenced to eighteen months to fifteen years in prison. (S Tr, 13).

The complainant [M.M], Petitioner's eight-year-old niece, testified she frequently spent the night with her uncle [Petitioner] and aunt [Debra Kittka]. (Tr I, 105, 111, 128). The last time M.M. spent the night at Petitioner's house, she slept downstairs on the floor and Petitioner slept behind her. (Tr I, 111). M.M. woke up when she felt Petitioner's hands where she "goes pee." (Tr I, 115). Petitioner touched M.M.'s bare skin under her pajamas. (Tr I, 116). M.M. testified that Petitioner touched her in this manner on more than one occasion. (Tr I, 121). When asked by defense counsel if the touchings happened every time she spent the night at Petitioner's house, M.M. responded, "most"... "at the end when I kept spending the night." (Tr I, 137). M.M. said the inappropriate touchings did not happen when she was five or six, but happened almost every time she spent the night when she was seven. (Tr I, 145).

Linda Miller [Miller], M.M.'s mother, testified that her sister Debra is married to Petitioner. (Tr I,

---

[1] Tr I = Trial Transcript, January 30, 2006
Tr II = Trial Transcript, January 31, 2006
Tr III = Trial Transcript, February 1, 2006
S Tr = Sentencing Transcript, March 2, 2006

149). Approximately four times a year M.M. spent the night, without her parents, at Petitioner's house. (Tr I, 152). M.M. spent the night at Petitioner's house on January 14, 2005, but was apprehensive about doing so. (Tr I, 155). A little over two weeks later, as Miller was putting her daughter to bed, M.M. said she had something to tell her mother but she was not sure if she wanted to tell her. (Tr I, 155-156). M.M. eventually told her mother what had happened with Petitioner. (Tr I, 157). M.M. was interviewed at Care House. (Tr I, 158). After the incident, M.M.'s behavior changed and she was very down on herself and had unexplained anger and fear. (Tr I, 162). M.M. told her mother that the abuse occurred four or five times. (Tr I, 178).

Novi Police Detective Mark Boody testified that he was at M.M.'s Care House interview. (Tr I, 187). Boody said the Care House interviewer, Amy Allen, followed the correct protocol. (Tr I, 188). Boody said that Allen did not ask any suggestive questions. (Tr I, 189).

Boody also interviewed Petitioner. Petitioner told Boody he would not have intentionally done anything to M.M. (Tr I, 206). Petitioner did not recall putting his hands in M.M.'s underwear. (Tr I, 210). Petitioner told Boody that what M.M. accused him of was possible because he could not imagine her lying and saying something like she did. (Tr I, 210). Petitioner said if M.M. said something happened, it must have happened, but he did not recall doing it. (Tr I, 210). Petitioner told Boody that if the touching happened while he was asleep, he must have touched

M.M. because he thought she was his wife. (Tr I, 213). Petitioner could not fathom intentionally touching M.M. in an inappropriate manner. (Tr II, 234). Petitioner never told Boody he thought M.M. was lying about the assault. (Tr II, 241).

Petitioner's wife, Debra Kittka, testified on his behalf. (Tr II, 281). Debra said Petitioner's reputation in the community for truth and honesty was exceptionally high. (Tr II, 282). On the night of the alleged assault, M.M. wanted to sleep downstairs and she asked Petitioner to sleep downstairs too. (Tr II, 292). Petitioner was asleep downstairs when Debra went upstairs to check on M.M.'s sister. (Tr II, 296). Debra went back downstairs and stayed there until approximately 2:00 a.m. Debra eventually heard Petitioner come to bed. (Tr II, 296). The next morning, M.M. came upstairs and immediately jumped on Petitioner's lap. (Tr II, 300). Debra believed M.M. required a lot of attention and had a tendency to lie. (Tr II, 283, 300-301). Debra had spoken to her sister about getting counseling for M.M. (Tr II, 300-301).

During sentencing, the prosecutor asserted that the sentencing guidelines set forth in the presentence investigation report were 19 to 35 months. (S Tr, 2). The prosecutor indicated that both he and defense counsel recognized that OV 9 should be scored at zero points, which reduced the guideline range to 12 to 24 points. (S Tr, 2). Defense counsel indicated, "[c]ertainly I agree with that, your Honor." (S Tr, 3). Defense counsel later indicated, "I believe that the guidelines now are 12 to 24 months. And it is a straddle cell." (S Tr, 7). Defense counsel requested a

jail sentence. (S Tr, 9). The prosecutor requested a 2 to 15 year sentence, but the trial court imposed an 18 month to 15 year sentence. (S Tr, 10, 13).

## ARGUMENT

I. PETITIONER HAS NOT SHOWN COMPELLING REASONS FOR REVIEW BECAUSE THE QUESTION PRESENTED BY PETITIONER WAS NEVER RAISED IN THE TRIAL COURT AND WAS NOT DISCUSSED BY MICHIGAN'S HIGHEST COURT AND THERE EXISTS NO CONTRADICTORY AUTHORITY THAT MICHIGAN'S INDETERMINATE SENTENCING SCHEME VIOLATES THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. CERTIORARI REVIEW IS UNWARRANTED BECAUSE THE MICHIGAN COURT OF APPEALS HAD ADEQUATE AND INDEPENDENT STATE LAW GROUNDS TO DENY PETITIONER'S APPEAL AND ANY DISCUSSION OF *BLAKELY V. WASHINGTON,* 542 U.S. 296 (2004) WAS OBITER DICTUM.

This Court should deny the petition for writ of certiorari because the highest court in Michigan, the Michigan Supreme Court, did not address Petitioner's *Blakely* issue. (Sup. Ct. R. 10(b)). Moreover, the Michigan Court of Appeals' discussion of the *Blakely* issue was obiter dictum because it was unnecessary to the decision in the case since the Court held that Petitioner's failure to preserve his sentencing issue was a "fatal flaw." (Pet. App., 3a). Therefore, even if the *Blakely* issue should ultimately be decided by this Court, this is not the proper case to do so.

As the Michigan Court of Appeals found, the parties agreed that the recommended guideline range

was 12 to 24 months. (Pet. App., 4a). In fact, the prosecutor filed a sentencing memorandum outlining that guideline range. Defense counsel's sentencing memorandum did not challenge the guideline range. (S Tr, 9).[2] At sentencing, the prosecutor recognized that the probation department had improperly scored OV 9 at ten points. (S Tr, 3). Defense counsel and the prosecutor agreed that OV 9 should not be scored and that the guideline range should be 12 to 24 months, not 19 to 35 months. (S Tr, 3). Defense counsel indicated, "[c]ertainly I agree with that, your Honor." (S Tr, 3).

Trial defense counsel never disputed the scoring of the sentencing guidelines and never challenged Petitioner's sentence on the basis of *Blakely, supra*. As the judges of the Michigan Court of Appeals recognized, Petitioner's untimely motion to remand in that court did not preserve the issue for appeal. (Pet. App., 3a). See Mich. Ct. R. 7.211(C)(1)(a).

Under state law, Petitioner waived any error in the scoring of the sentencing guidelines by specifically conceding the validity of the guideline range. See *People v. Carter,* 462 Mich. 206, 215; 612 N.W. 144 (2000). Admittedly, Petitioner did not specifically waive his belated *Blakely* challenge during sentencing. However, Petitioner only has a *Blakely* challenge because of the alleged error in scoring OV 13. Therefore, defense counsel's articulated concession to the OV score should also constitute a "fatal flaw" to

---

[2] Defense counsel's "Sentencing Memorandum and Request for Deviation" was apparently given to the sentencing judge (S Tr, 9), but was not filed.

Petitioner's *Blakely* challenge. As this Court recognized in *Blakely*, states may continue to utilize judicial fact-finding as to sentence enhancement if defendants consent to such judicial fact-finding. *Id.* at 310. Petitioner implicitly consented to the use of judicial fact-finding when he specifically agreed that the guidelines had been properly scored.

The Michigan Court of Appeals was correct in ruling that Petitioner's procedural default was a "fatal flaw" because defense counsel articulated that he had no objection to the scoring of the sentencing guidelines and because the motion to remand for resentencing was untimely. (Pet. App., 3a). Although the Court also discussed *Blakely* in its opinion, that discussion was "obiter dictum." Black's Law Dictionary (7th ed.), defines "obiter dictum" as: "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential ...." The *Blakely* analysis in this case was *obiter dictum* because it was unnecessary to the Court of Appeals' decision. Therefore, this Court should deny Petitioner's petition for writ of certiorari because the Michigan Court of Appeals had adequate and independent state law grounds to deny his appeal. For that reason, this Court need not review the merits of the petition.

B. PETITIONER HAS NO CONSTITUTIONAL RIGHT TO AN INTERMEDIATE SANCTION AND TRIAL JUDGES MAY ENGAGE IN JUDICIAL FACTFINDING IN IMPOSING A ***MINIMUM SENTENCE***.

Even if this Court reviews the merits of the petition, this Court should deny the petition for writ of certiorari because Michigan's indeterminate sentencing scheme does not violate the Sixth Amendment to the United States Constitution.

Under the Sixth and Fourteen Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000). Therefore, the key question here is whether or not the trial court used judicial factfinding to increase Petitioner's statutory maximum, as that term is defined in *Blakely, supra* at 303 [the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant].

In Michigan, absolute maximum sentences are governed by statute. Mich. Comp. Law Ann. § 769.8(1)(West 2007). The maximum sentence for second degree criminal sexual conduct is fifteen years in prison. Mich. Comp. Law Ann. §750.520c(1)(a)(West 2007). The fact that Michigan's Legislative sentencing guidelines allow for intermediate sentences for less than the statutory maximum does not change the fact

that the statutory maximum for this crime is fifteen years.

Michigan's sentencing guidelines set a range for a defendant's ***minimum*** sentence. *People v. McCuller,* 479 Mich. 672, 684; 739 N.W.2d 563(2007). "A defendant's recommended minimum sentence range under the guidelines is determined on the basis of the defendant's record of prior convictions (the PRV score), the facts surrounding his crime (the OV score), and the legislatively designated offense class." *People v. Harper,* 479 Mich. 599, 616; 739 N.W.2d 523 (2007). See also Mich. Comp. Law Ann. § 769.34(2)(West 2007). A sentencing court calculates PRVs and OVs to determine 'the recommended *minimum* sentence range." *Harper, supra* at 624, citing Mich. Comp. Law Ann. §777.21(1)(West 2007). The statutory provision concerning intermediate sanctions ***is a matter of legislative leniency*** *permitting a defendant to be incarcerated for a period of time less than that authorized by the jury's verdict. McCuller, supra* at 694-695. *Blakely* does not entitle a defendant to a sentence less than the one authorized by the verdict. *Harper, supra* at 616.

Petitioner's assertion that an intermediate sanction constitutes the "maximum sentence" is wrong as set forth in detail in *McCuller, supra* at 689-690:

> Thus, a sentencing court does not violate *Blakely* principles by engaging in judicial fact-finding to score the OVs to calculate the recommended *minimum* sentence range, even when the scoring of the OVs places the

> defendant in a straddle cell or a cell requiring a prison term instead of an intermediate sanction cell. The sentencing court's factual findings do not elevate the defendant's maximum sentence, but merely determine the defendant's recommended minimum sentence range, which may consequently qualify the defendant for an intermediate sanction.

Petitioner's guideline range constitutes a "straddle cell" and not an "intermediate sanction cell." As set forth above, Michigan's sentencing scheme requires the sentencing court to impose the maximum sentence required by statute and then the sentencing court imposes a minimum sentence based upon the scoring of the Sentencing Guidelines adopted by the Legislature. Defense counsel conceded the scoring of the guidelines resulting in a minimum sentence range in a "straddle cell." Under a straddle cell, the sentencing court may sentence a defendant to either a term of years in a state prison or to an intermediate sanction including a period of time in a county jail. Mich. Comp. Law Ann. §769.34(4)(c)(West 2007). In comparison, under an intermediate cell, a defendant can only be sentenced to a minimum sentence of a period of incarceration in a county jail or to a number of other intermediate sanctions. Mich. Comp. Law Ann. §§ 769.31(b); 769.34(4)(a)(West 2007). The scoring of the Sentencing Guidelines in this case did not result in an intermediate cell. If this Court desires to review a Michigan sentence involving an intermediate sanction cell, Petitioner's case is not an appropriate case for such review.

Petitioner's argument that a trial judge may only eschew the intermediate sanction requirement on the basis of facts proved to a jury beyond a reasonable doubt is wrong because the guidelines only affect a defendant's minimum sentence and that minimum sentence cannot be calculated without examining the OV and PRV scores. The maximum sentence never changes – it is the statutory maximum for the charged crime. As recognized by the Michigan Supreme Court:

> To determine a defendant's minimum sentence range under the guidelines, the sentencing court must first score the OVs and the PRVs and consider the offense class. MCL 777.21. Thus, under MCL 769.34(4)(a), a defendant does not even qualify for an intermediate sanction until after the court has scored all the sentencing variables, including the OVs, and those variables indicate that the upper limit of the defendant's minimum sentence range is 18 months or less. In other words, a defendant's qualification for an intermediate sanction is contingent on the sentencing court's calculation of all the defendant's sentencing variables. A defendant has no legal right to have his minimum sentence calculated using only a portion of the statutorily enumerated factors. [*McCuller, supra* at 689].

Because Petitioner has no legal right to an intermediate sentence, judicial fact-finding may be used to determine his minimum sentence. *Blakely* does not mandate a different result.

## C. THE TRIAL COURT DID NOT IMPOSE A SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT.

Petitioner's argument that the jury verdict "entitled" him to an intermediate sanction is wrong. The jury verdict only "entitled" Petitioner to a maximum sentence of no more than fifteen years. "A defendant has no legal right to expect any lesser maximum sentence." *McCuller, supra* at 689.[3] Petitioner never gained a legal right to an intermediate sanction. *Id.* at 690.

---

[3] The only distinction between *McCuller, supra* and the instant case is the fact that there would be no "harmless error" argument in this case if this Court concludes that the use of judicial factfinding to score the offense variables is inappropriate. The reason being, the jury in this case rejected one additional count of second degree criminal sexual conduct.

Currently in Michigan, a sentencing court has discretion to determine the scoring of offense variables, provided there is evidence on the record to support a particular score. *People v. Hornsby,* 251 Mich. App. 462, 468; 650 N.W.2d 700 (2002). The sentencing court's scoring should be upheld if there is any support in the record for it. *People v. Houston,* 261 Mich. App. 463, 471; 683 N.W.2d 192 (2004), aff'd 473 Mich. 399 (2005). The burden of proof for sentencing purposes is preponderance of the evidence. *People v. Walker,* 428 Mich. 261, 267-268; 407 N.W.2d 367 (1987); *People v. Perez,* 255 Mich. App. 703, 712-713; 662 N.W. 446 (2003), vacated in part on other grounds 469 Mich. 415 (2003); *People v. Ratkov,* 201 Mich. App. 123, 125-126; 505 N.W.2d 886 (1993), remanded on other grounds 447 Mich. 984 (1994). The scoring of the guidelines can be inconsistent with the result of the jury trial. *Perez, supra* at 713; *Ratkov, supra* at 126.

Defendant's eighteen-month minimum sentence for the sexual assault of his niece was proper even though it was based on judicial fact-finding. "This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Rita v. U.S.*, 127 S.Ct. 2456, 2465 (2007). Only facts that increase the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi, supra* at 490.

Michigan has an indeterminate sentencing scheme, not a determinate sentencing scheme. *People v. Drohan,* 475 Mich. 140, 160-161; 715 N.W.2d 228 (2006). An *indeterminate* sentencing scheme does not suffer from the same constitutional infirmities as *determinate* schemes. As set forth in *Blakely, supra,* the State of Washington had a sentencing scheme in which the court selected one [determinate] number for a defendant's sentence. Once the defendant started serving the sentence, he could not be paroled. Justice Scalia in *Blakely, supra* compared that scheme to an indeterminate scheme:

> [Indeterminate sentencing] increases judicial discretion, to be sure, *but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty.* Of course, indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) *may implicitly rule on those facts he deems important to the exercise of his sentencing discretion.* But the facts do

> not pertain to whether the defendant has a legal *right* to a lesser sentence--*and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.* In a system that says a judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence--and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. (emphasis supplied)

In *Blakely, supra,* this Court cited with approval its prior decisions in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) and *Harris v. United States*, 536 U.S. 545 (2002). In *McMillan, supra,* a Pennsylvania statute required a sentencing court to impose a mandatory minimum sentence of five years imprisonment for certain enumerated felonies, if the sentencing court found from a ***preponderance of the evidence*** that the defendant committed the enumerated felony while visibly possessing a firearm. This Court found that such a mandatory minimum sentence based upon an additional finding of fact by the sentencing court did not deny the defendant of his Sixth Amendment right to a jury trial. Each of the enumerated felonies in the Pennsylvania statute carried a maximum sentence of over five years. In upholding the constitutionality of the Pennsylvania statute, this Court observed that the statute did not increase the maximum sentence for

enumerated felonies, but rather only required the imposition of a mandatory minimum five year sentence. *McMillan, supra* 81-86. This Court also recognized that preventing and dealing with crime was much more the business of the states than it was the federal government and this Court should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states. *McMillan, supra* at 85-86.

In *Harris, supra,* a federal statute permitted a trial court to impose a mandatory minimum sentence based upon an additional finding of fact. In affirming the defendant's sentence, this Court found no violation of the principles set forth in *Apprendi, supra*, because the statute in question did not permit the trial court to increase the statutory maximum sentence. This Court reasoned as follows:

> *McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence ***beyond the maximum authorized by the jury's verdict*** would have been considered an element of an aggravated crime – and thus the domain of the jury – by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the

> finding. As *McMillan* recognized, a statute may reserve this type of factual finding for the judge without violating the Constitution." [*Harris, supra* at 557].

Unlike in *Harris* and *McMillan, supra,* this Court's decisions in *Blakely* and *Cunningham v. California,* 549 U.S. (2007), involved sentencing schemes which impacted the defendants' maximum sentences. Michigan, unlike Washington and California, has an indeterminate sentencing scheme in which the trial court must impose the statutory maximum sentence for the offense committed. The trial court must also impose a minimum sentence within the range recommended by the Sentencing Guidelines. The trial court cannot increase the maximum sentence based upon any findings of fact not proven to the jury, except for a prior felony conviction. This Court in *Blakely, supra,* recognized that such an indeterminate sentencing scheme under which the trial court cannot increase the maximum sentence does not deprive a defendant of his constitutional right to a trial by jury. By its own language, the decision of this Court in *Blakely,* has no effect upon Michigan's indeterminate sentencing scheme.

In *Cunningham, supra,* this Court held that California's determinate sentencing scheme which permitted a trial court to make findings of fact and to increase a defendant's maximum sentence based upon those facts violated the principles set forth in *Blakely, supra,* and its progeny. In *Cunningham, supra,* the defendant was tried and convicted by a jury of continuous sexual abuse of a child under 14 years-old.

Under California's Determinate Sentencing Law (DSL), the trial court was required to sentence the defendant for that offense to a fixed, determinate sentence of 12 years imprisonment. Under the DSL, however, the trial court could and did hold a post-trial sentencing hearing and, by a preponderance of the evidence, found aggravating facts. Based upon finding the aggravating facts, the DSL permitted the trial court to increase the defendant's fixed determinate sentence from 12 years to 16 years imprisonment, which the trial court did. This Court held that the provision of the DSL which permitted the trial court to increase the maximum statutory sentence based upon its own finding of aggravating facts deprived the defendant of his right to a jury trial pursuant to the Sixth Amendment as to those facts. *Cunningham, supra* at 870. This Court found that in all material respects, California's DSL was no different than the determinate sentencing schemes involved in *Blakely, supra,* and *United States v. Booker,* 543 U.S. 220 (2005).[4] *Cunningham, supra* at 870. This Court reiterated that the "statutory maximum sentence" for *Blakely* purposes is the maximum sentence which a trial court may impose on the basis of facts reflected in the jury's verdict or admitted by the defendant. *Id.* at 868.

---

[4] In *Booker, supra,* this Court struck down the portion of the Federal Sentencing Guidelines mandating trial judges to sentence without the guideline range. This Court recognized that if the guidelines were merely advisory, they would not implicate the Sixth Amendment. *Booker, supra* at 866-869.

Significantly, this Court in *Cunningham, supra,* also reiterated that indeterminate sentencing schemes which permit a trial court to sentence within a range of years, but not to increase a defendant's maximum sentence, do not run afoul of *Blakely, supra.* In speaking to California's possible remedies after *Cunningham, supra,* this Court recognized that "other states have permitted judges genuinely 'to exercise broad discretion...within a statutory range', which 'everyone agrees,' encounters no Sixth Amendment shoal." *Booker,* 543 U.S. at 233." (Footnote omitted). [*Cunningham, supra* at 871].

This Court in *Cunningham, supra* at 871, also quoted with approval the language in *Booker, supra,* in which this Court "...never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." This Court has consistently held that indeterminate sentencing schemes which permit a trial court to base a minimum sentence upon facts not found by a jury are constitutional, while determinate sentencing schemes under which a trial court could increase the maximum determinate sentence based upon facts not proven to a jury run afoul of *Blakely, supra.*

In contrast to *Cunningham, supra,* the judge in this case could only find facts in the scoring of the Sentencing Guidelines which determined the range of Petitioner's *minimum sentence.* In Michigan, a trial court may only increase a defendant's maximum sentence based upon a defendant's prior felony convictions. Consequently, the Sixth Amendment concerns addressed in *Blakely* and *Cunningham* simply

do not exist in Michigan because the State does not have a determinate sentencing scheme. Therefore, this Court should deny the petition for writ of certiorari.

## CONCLUSION AND RELIEF

For all of these reasons, Respondent request that the Petition for Writ of Certiorari be denied.

Respectfully submitted

David G. Gorcyca
Prosecuting Attorney
Oakland County Michigan

JOHN PALLAS (P42514)
*Counsel of Record*
Oakland County
Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656

MARILYN J. DAY (P44116)
Assistant Prosecuting Attorneys
Attorneys for Respondent

Dated: March 7, 2008